No. 20,920

IN THE

United States Court of Appeals

For the Ninth Circuit

China Union Lines, Ltd.,
a corporation,
Appellant.

vs.

States Steamship Company,
a corporation,
Appellee.

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

I. INTRODUCTION

At the trial of this case States Steamship Company and China Union Lines each vigorously asserted the other was solely at fault for the collision. In its memorandum opinion and findings of fact the district court resolved this dispute, and the conflicts in the evidence, by finding that fault on the part of each vessel contributed in equal measure to the collision, and a decree of mutual fault was entered against both parties.[1]

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[1] It should be noted that the Findings of Fact and Conclusions of Law incorporated all suggestions made by appellant and were entered without objection by appellant.

Many of the factual and legal contentions urged by appellant in the district court have been abandoned on appeal and new contentions substituted. In its opening brief appellant urges this court to consider these factual contentions *de novo* in the hope that this court may evaluate the case differently than did the district judge and, hopefully, with a different result. (AOB 32-34.)

Since 1954, when the Supreme Court decided *McAllister v. United States,* 348 U.S. 19 (1954), this court has repeatedly held that "the ghost of trial *de novo* in this intermediate appellate court has been laid to rest . . ." (*The President Van Buren,* 223 F.2d 853, 855 (9th Cir. 1955); see also *Peterson v. United States,* 224 F.2d 748, 749 (9th Cir. 1955).) Accordingly, appellant misapprehends the law when it implies that the concept of trial *de novo* should govern this appeal. As the Supreme Court said in *McAllister v. United States, supra,* and as this court said in *Benton v. United Towing Co.,* 224 F.2d 558 (9th Cir. 1955), " 'Findings of fact shall not be set aside unless clearly erroneous . . .' ".

Appellee is confident that the record in this case so clearly supports the trial court's finding of fault on the part of the *Union Star* that a trial *de novo* could suggest no other result. Nonetheless, it would seem improper that appellant's suggestion of a trial *de novo* be received without comment.

II. JURISDICTION

Jurisdiction in the District Court arose under 28 U.S.C. 1333, and jurisdiction to review the judgment is conferred upon the Court of Appeals by 28 U.S.C. 1291 and 1294.

III. STATEMENT OF THE CASE

A. THE ILLINOIS' POSITION NEAR THE KORHYU WRECK BUOY.

The *Illinois*, a 455 foot vessel operated by appellee, left the city of Saigon at about 0800 on August 26, 1960, and proceeded down the Saigon River on its way to sea. (Ex. 3.) A Saigon River pilot, Phan Hu Hai, was piloting the vessel, and before going to sea it would be necessary to drop him off at the pilot station near the Korhyu Buoy. Upon leaving the mouth of the Saigon River the *Illinois* entered Ganh Rai Bay on a southeasterly course (143°) (Tr 29:13-24). When abeam of the Kunigawa Buoy the *Illinois* turned south and proceeded on course 180° (Tr 29:24-30:1) until she was approximately one mile off and abeam of Cape Eperon. At this time (1128) (Ex 5) course was changed to 150° and speed was reduced to slow ahead. (Tr 31:15-32:15.) The *Illinois* continued slow ahead on course 150° for about two minutes, during which time Pilot Hai observed a vessel (later identified as the *Union Star*) anchored between the Korhyu Buoy and the Kontom Buoy (Tr. 35:21-36:1), but to the west of a line between them. After continuing slowly ahead on course 150° for about two minutes the *Illinois*, at 1130, changed course to 145°, and at 1133, while proceeding on that course, her engines were stopped (Tr. 33:18-19, Ex. 5), so that she could drift to a position dead in the water near the pilot station and the safe exit range where Pilot Hai would disembark. The *Illinois* stopped dead in the water about 400 meters (437.5 yards) northwest of the Korhyu wreck buoy. (Tr. 27:6-8.) This was probably about 1136, i.e., several minutes after 1133 when her engines were stopped (Ex. 5) and a few minutes before Pilot Hai disembarked.

(Exs. 3, 5.) Before leaving the vessel Pilot Hai went into the chart room with the *Illinois'* master, Captain Sorensen, and there described and drew upon a chart the recommended range line which the *Illinois* should follow in the absence of the departure buoy. (Tr. 34:9-13; 42:25-43:4; Ex. 4.)

The *Illinois'* position 400 meters northwest of the Korhyu wreck buoy was the natural result of the courses previously steered. These courses (180° from the Kumigawa buoy then, when abeam Cape Eperon, 150° for two minutes, then 145° until dead in the water) were the customary courses steered by all Saigon pilots in approaching the pilot station and departure range. Captain Sorensen referred to them as "pilot courses". (Tr. 150:19.) Pilot Dy of the *Union Star* repeatedly referred to the various headings of the *Illinois* as 180°, 150° or 145°. (Tr. 205:25; 206:15.) The absolute accuracy of these estimates can only be explained if these courses were steered by every vessel approaching the pilot disembarkation station and departure range. The significance of this fact is that in coming to rest at this position and thereafter proceeding to sea on the departure range the *Illinois* was following a well-established and predictable sequence of actions, which were, or should have been, obvious to the *Union Star's* navigators, and in particular her pilot.

B. THE UNION STAR'S ANCHORAGE POSITION.

The *Union Star,* having arrived earlier that morning, was anchored west of the Nui Vung Tau Lighthouse. The precise anchorage position is difficult to locate with certainty since (1) her log states that she anchored 1.2 miles

due west of the lighthouse (Ex. J), (2) her master claims she anchored exactly one mile west of the lighthouse (Tr. 228:4-8), and (3) her pilot testified that her anchorage position when he boarded was 10°, 10 minutes north, 107°, 3 minutes, 1 second east (Tr. 202:4-9), *i.e.*, about 1.26 miles west of the lighthouse. These apparently slight differences in even the claimed position of the *Union Star* result in a somewhat different relationship between her and the *Illinois* when the *Illinois* later arrived on the scene. These differences are significant only because the vessels were quite close (about .6 of a mile apart) when they started moving toward one another and they therefore found themselves maneuvering in very close quarters, where seemingly small changes in estimated angles of approach could substantially affect their navigation.

In finding that the *Union Star* was anchored 1.2 or 1.3 miles from the lighthouse the district court, in effect, accepted the *Union Star's* testimony and compromised its internal conflicts. In doing so the court ignored the estimates of the *Union Star's* position given by *Illinois* personnel which were given in terms of distance and bearing from the *Illinois*. Since the *Illinois'* own position and heading changed from time to time, the position of the *Union Star* according to these estimates could be ascertained only by first determining the heading and location of the *Illinois* at the reference time for each estimate. The district judge may have felt that such estimates of the *Union Star's* anchorage position were necessarily imprecise and so accepted instead the anchorage position reflected by the *Union Star's* log and the testimony of her pilot.

In the event it remains of interest to the court, the *Illinois'* master, Captain Sorensen, testified that he saw the *Union Star* bearing about 215° true about .3 of a mile distant just before he got under way at 1140. (Tr. 117:24-118:5.) Second Mate McCarthy said that just before he left the bridge to go to lunch he saw the *Union Star* about 10°-20° on the starboard bow from one half to one mile away.[2] Thus, both Captain Sorensen and Chief Mate McCarthy placed the *Union Star* a few hundred yards to the west of the departure range (rather than to the east of it as appellant claims) and several hundred yards north of the anchorage position claimed by appellant. From all of this it will be noted that there is conflict and inconsistency to some extent between *all* witnesses regarding the *Union Star's* anchorage position, which was resolved by the district court as above noted. It is not necessary to quarrel with the district court's findings in order to demonstrate the *Union Star's* liability, and appellee accepts that finding for the purposes of this appeal.

C. THE HEADINGS OF TWO VESSELS AS THEY COMMENCED MANEUVERING TOWARD ONE ANOTHER.

Accepting for the purposes of argument the positions of the two vessels as claimed by appellant, there remains only to ascertain their headings at the time the *Union Star* got under way. As to the *Union Star,* her pilot testified that her heading when she got under way was

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[2]Since the *Illinois* changed course at 1128 from 180° to 150° when abeam of Cape Eperon (Ex. 5; Tr. 31:15-32:16), and since McCarthy went to lunch at 1130 (Tr. 69:1), and since he testified that his observation of the *Union Star* was made when the *Illinois* was abeam or south of Cape Eperon (Tr. 70:14-21), it is quite proper to assume that the *Illinois* was on course at 150° at this time, and not on course 180°, as appellants have suggested (AOB 21).

"obviously" north northwest (337½°).[3] As to the *Illinois*, the last course steered before she came to a stop was 145° (Tr. 39:24-40:2), and, at the time the *Union Star* got under way, she was probably still near this heading, although a few minutes later her bow had drifted south to a southerly heading (Tr. 120:12-13; 116:7-18). Thus, when the *Union Star* got under way at 1137, the *Union Star* was headed north northwest (337½°) and the *Illinois* was headed about 145° true and the two vessels were therefore on almost reciprocal courses, there being a discrepancy of only 12° to 13°. The vessels were about a half mile apart at this point.

D. UNION STAR'S MANEUVERS.

According to her pilot, the *Union Star,* after getting under way at 1136 or 1137 (Exs. M, N), came to course 348° and maintained this course for three minutes, after which course was altered to 353° (Tr. 210:7-11). This first three minutes is critical since it brings the *Union Star* to 1140 which was the time that Captain Sorensen ordered full ahead (Ex. 5) after watching the pilot boat leave with the *Illinois'* pilot. At this point, the vessels would necessarily have been about 500 to 600 yards apart, with the *Union Star,* as long as she was still on course 348°, headed directly for the *Illinois.*

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[3]Appellant quarrels with the use of the word "obviously", suggesting that this is an inaccurate translation from the French. (AOB 6.) Since this translation was procured by appellant's counsel and thereafter approved by appellee's translators we question the propriety of now attempting to change the connotations of the translation *ad hoc.* The translation suggested by appellant on appeal should not differ from that which it urged in the district court. This observation applies also to all instances in appellant's opening brief where it attempts to strengthen its position by suggesting, for the first time, that its own translation is incorrect.

With regard to the *Illinois'* headings and maneuvers, it is undisputed that the last course ordered before the *Illinois* drifted to a stop dead in the water was 145°. (AOB 6.) Since she still had some slight headway until about 1135 (Tr. 150:8-13), the *Illinois* had probably not drifted too far from this heading at the time the *Union Star* got underway at 1137 (Ex. M). A few minutes later (1140) when Captain Sorensen ordered the *Illinois'* engines full ahead (Ex. 5) to depart from the pilot station on the departure range line, the *Illinois* was headed in a southerly direction. Captain Sorensen estimated her heading at this time (1140) to be about 180° to 185° (Tr. 120:12-13; 116:7-18). Although this southerly heading is now vigorously disputed by appellant, it was admitted at one point by Captain Hu of the *Union Star* when he said that one minute before the collision (when the *Union Star* went full astern at 1142) the *Illinois* was heading southerly (Tr. 270:22-24). Captain Sorensen attributed the change in the *Illinois'* heading from 145° to 180° to the effects of wind and current (Tr. 150:16-151:2). Certainly, this is the logical explanation for this change in heading since it is normal to have varying current eddies when the tide is changing as it was at this time. (Tr. 149:10-15.) In fact, the *Union Star's* own heading changed from north (Tr. 254:4) when she anchored to north northwest at the time she weighed anchor (Tr. 230:20-231:14), a change of 22½° which could only be due to the then commencing change of tide.[4]

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[4]Captain Hu testified "Tide almost slacking to flood a little, almost slacking to flood". (Tr 246:14-15.) The *Illinois'* Second Mate, Mr. McCarthy, said the current ". . . was on the change, starting to flood". (Tr 67:10.) Pilot Dy of the *Union Star* said in his report of August 27, 1960 that the water was "agitated". (Ex D.)

Certainly reason insists that the *Illinois* was headed south at 1140 since if she were still on course 145°, there could be no reason whatever for the *Illinois* to turn left and thereby approach the 182° departure range at an even greater angle than 145°. If he were still on course 145°, Captain Sorensen's first course change would have been to the right in the general direction of his destination and alignment with the 182° departure range. For the *Illinois* to have turned left from 145° would have been an incredibly senseless and dangerous maneuver since it would have resulted in the *Illinois'* intersecting the departure range at an extremely broad angle on a heading directly toward the Korhyu wreck zone. The *Illinois'* slight and gradual turn to the left could be explained only if in fact she were heading south at the time she initiated it.

Parenthetically, appellee should note that both Captain Hu and Pilot Dy realized that their version of the collision would require their assertion of such a senseless and pointless turn. In support of this claim, Captain Hu also claimed that the *Illinois* went from a position two miles and two points on the *Union Star's* port bow (Tr. 261:22-262:10) at 1137 (Ex. M) to the point of collision six minutes later. This would require the *Illinois*, which was incapable of such speed (Tr. 129:5-10), to have pursued a suicidal left turn at a speed of 20 knots for the entire distance to the point of collision. Captain Hu and Pilot Dy fully discussed the matter before either of them prepared a report to his superior (Tr. 274:10-16), and Pilot Dy's testimony was only slightly more conservative. He estimated that the *Illinois* approached and crossed the departure range at right angles at a speed of 12 or 13

knots headed straight for the Korhyu wreck buoy. (Tr. 212:2-20.) Actually, the *Illinois* was only moving at 3 knots maximum before she stopped her engines. (Tr. 131: 14-15; Ex. 5.) Both Captain Hu and Pilot Dy must have been aware that they could not justify their own maneuvers unless they could convince their superiors that the *Illinois* engaged in such a suicidal and impossible maneuver. Realizing that no one would believe such conduct possible of a rational navigator, Captain Hu at one point attempted to suggest that Captain Sorensen was drunk at the time. (Tr. 244:11-15.) This suggestion has been quietly abandoned since it was completely refuted by the testimony of not only Captain Sorensen but also the two pilots who were with him at different times before and after the collision. (Tr. 51:4-17; 215:17-19.)

Being aware that a high speed left turn by the *Illinois* toward the Korhyu buoy is simply incredible under the circumstances, but being also aware that its version of the collision depends upon acceptance of such a turn, appellant has devoted a substantial portion of its opening brief to the hypothesis that maneuvering the *Illinois* onto the departure range presented the same difficulty as backing a trailer truck, and that Captain Sorensen, like an inexperienced truck driver, ordered left rudder when he intended to order right rudder. (AOB 23-27; 51-52.) This hypothesis, born solely of desperation and a fertile imagination, is as specious as was the earlier suggestion that Captain Sorensen had been drinking. Captain Sorensen has had an American master's license since 1943 and before that a Danish license. He has served with States Line for over twenty years. (Tr. 102:5-20.) He has been

in and out of Saigon thirty to forty times, and, as Pilot Hai put it, is ". . . an old timer on the line." (Tr. 27:19.) He was not only familiar with the departure range (Tr. 110:4-5) but was familiar with all the local landmarks. To Captain Sorensen it was "just like looking across the street". (Tr. 119:1-3.) The use of entrance and departure range lines is too common an occurrence throughout the world to have confused a master of Captain Sorensen's experience, and there is no support in the record whatever for appellant's assertion (AOB 23) that this particular range caused Captain Sorensen difficulty or that he was confronted with an unusual or difficult problem in navigating with reference to landmarks astern.[5]

Discarding the probability of a suicidal high speed left turn from a point west of the *Union Star* across her bow and into collision, and recognizing that Captain Sorensen was an experienced and rational master, it follows that the *Illinois* was, as Captain Sorensen testified, very close (100 feet) to the departure range line (Tr. 119:4-13) (and 400 meters west of the Korhyu Wreck Buoy) and headed south when, at 1140, he got under way and ordered left

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[5]The court will note the lack of transcript references in connection with this portion of appellant's brief. (AOB 23-27, 49-50.) In addition, it should be noted that (1) the footnoted contention appearing on page 25 of appellant's brief is in no way supported by the transcript reference given and (2) in connection with its observation (AOB 26) that Captain Sorensen did not immediately serve a note of protest on Captain Hu, appellant has not (with good reason) asserted that there is any custom or practice among American masters to do so before consulting owners' attorneys; (3) appellant's reference (AOB 26) to appellee's objection to the obtaining of Pilot Hai's testimony is false—appellee *excepted* to various questions and the form thereof propounded by appellant. Finally, with regard to the absence of additional witnesses having knowledge of the details of the *Illinois'* navigation (AOB 26) appellant has not (again with good reason) asserted there were any such witnesses.

rudder in order to position the *Illinois* on the departure range line. It was after he had blown a two-blast signal indicating this initial left turn that he heard the one-blast signal from the *Union Star* and saw her headed directly toward the *Illinois* (Tr. 122:7-123:7). Captain Sorensen thereupon ordered hard left rudder in an attempt to parallel the *Union Star's* course.

The sequence of these events can be reconstructed as follows: The *Illinois'* pilot left the bridge at 1138 (Tr. 148:20), descended to the main deck and went over the side into the pilot boat, which departed from the *Illinois'* port side at 1139. (Tr. 106:6; Exs. 3 and 5.) After seeing the pilot boat depart Captain Sorensen walked over to the starboard wing of the bridge to check on the position of the *Union Star* (Tr. 120:2-3) (which unknown to him had gotten under way 2 to 2½ minutes earlier while he and Pilot Hai were still in the chart room laying out the departure range line). When Captain Sorensen got to the starboard wing of the bridge he saw the *Union Star* about 3/10 of a mile away (Tr. 114:14-115:3) with her anchor chain still in the water and her anchor ball still hoisted (Tr. 118:6-15). This portion of Captain Sorensen's testimony was confirmed by Seaman Dobas who also saw the *Union Star* at that time with her anchor chain in the water and her anchor ball still aloft. (Tr. 91:5-24.) Pilot Hai also saw the *Union Star's* anchor ball before he left the bridge at 1138. (Tr. 43:15-20.) After ascertaining the position of the *Union Star,* Captain Sorensen, at 1140, went full ahead on his engines (Ex. 5) and ordered "a couple of degrees" left turn. (Tr. 121:11-18.) It was approximately at this time that the *Union Star* claims to have altered course from 348° to 353°, yet no one-blast

signal was heard until after the *Illinois* blew two blasts and started her gradual turn to the left. (Tr. 122:7-11.) It will be shown that it was not the *Union Star's* turn from 348° to 353° which was signalled, but a later turn. In any event, after thus checking on the *Union Star* Captain Sorensen ordered full ahead and ordered the helmsman to "come left a little—just a couple of degrees", blowing a two-blast whistle signal at the same time. (Tr. 121:5-18.) He then walked back to the port wing of the bridge to ascertain his alignment with the departure range. (Tr. 121:16-22.) This all happened at 1140, according to the *Illinois'* deck bell book (Ex. 5), and this is confirmed by the *Union Star's* testimony that three minutes after 1136½ or 1137 (when the *Union Star* got under way) the *Union Star* changed course from 348° to 353° in order to pass between the *Illinois* and the Korhyu Wreck Buoy. (Tr. 210:7-13.) Captain Hu and Pilot Dy evidently did not realize when they made this small turn that the *Illinois* was beginning to move ahead. The *Union Star's* pilot was watching landmarks (Tr. 220:23-221:2) and, no doubt, also lining himself up with reference to various navigation buoys. In any event, as soon as the *Illinois* blew her two-blast signal at 1140 the *Union Star's* navigators' attention was then particularly drawn to the *Illinois*, and they certainly then became aware that the *Illinois* was under way and turning left. At that moment the *Union Star* made the unfortunate decision to make an additional turn to starboard in order to force a port to port passing and squeeze between the *Illinois* and the Korhyu Wreck Buoy. The vessels were, however, too close for this maneuver to be carried out, which Captain Sorensen realized when he heard the *Union Star's* one-blast

signal, indicating to him that the *Union Star* had turned to a collision course. He, accordingly, ordered a left turn so that both vessels were headed in the same direction. Despite this maneuver, the vessels scraped each other as they came alongside on almost parallel courses.

IV. ARGUMENT

A. PRELIMINARY COMMENT

In its cross-libel appellant asserted that the Narrow Channel Rule governed the navigation of the *Union Star* and the *Illinois,* and charged the *Illinois* with fault for having failed to pass port to port. (Cross-libel, p. 5, paras. 5, 6 and 7.) During all of the proceedings before the district court appellant continued to rely on the Narrow Channel Rule as justification for its maneuvers. On the other hand, appellee asserted that the vessels were governed by the Special Circumstances Rule[6] because the vessels were navigating at the time of the collision in an area which was both an anchorage and a pilot station, where outgoing and incoming vessels had to stop and discharge or take aboard pilots, maneuvering as necessary to accomplish this purpose. Such circumstances invoke application of the Special Circumstances Rule.[7]

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[6] 33 U.S.C.A. § 1089:

> "In obeying and construing sections 1078-1089 of this title due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from such sections necessary in order to avoid immediate danger."

[7] *Arfeld-Lacuna,* 42 F. 2d 745 at p. 748 (D.C. La. 1930); *Port Adelaide-Julesburg,* 181 F. 2d 365 at p. 366 (2d Cir. 1950); *Darby-Soya Atlantic,* 213 F. Supp. 7 at p. 24 (D.C. Md. 1963); *Skibs Aktieselskapet Orenor v. The Audrey,* 181 F. Supp. 697 at 702 (E.D. Va. 1960), *affirmed,* 287 F. 2d 706.

Appellant has now abandoned its contention that the two vessels were governed by the Narrow Channel Rule, and its opening brief indicates that it is now in agreement that the Special Circumstances Rule was applicable. (AOB 52-53.) In employing the Special Circumstances Rule particular note should be taken that the area where the collision occurred was one where vessels were required and expected to maneuver on a variety of headings and speeds, and other vessels, realizing the nature and purpose of the anchorage, were required to maneuver with caution in anticipation of such maneuvers as circumstances might require. It should also be noted that one of the circumstances then existing was the absence of the departure buoy. The consequence of this missing buoy was the requirement that departing vessels proceed to sea on the departure range described by Pilot Hai. The *Union Star's* pilot knew of this requirement and should have expected the *Illinois* to maneuver onto this range line after dropping her pilot. However, disregarding these special circumstances and the required maneuvers of the *Illinois,* the *Union Star* blindly and determinedly maneuvered so as to squeeze between the *Illinois* and the Korhyu Wreck Buoy. As events developed this meant that the vessels found themselves maneuvering in opposite directions and in extremely close quarters. The unfortunate result was foreseeable.

B. THE DIAGRAM ATTACHED TO APPELLANT'S OPENING BRIEF (APPENDIX B)

In the diagram attached to appellant's opening brief there is drawn what purports to be the 182° departure range line. This "safe exit" departure range was described by Pilot Hai as a 182° line drawn from Nui Ba Lai 50 meters on Point Vung.[8] (Tr. 34:9-13.) Pilot Dy described the line as 182° from the 164 ft. summit and tangent to Point Vung.

In depicting this departure range line on the diagram (Appendix B) appellant has actually drawn a 183° line instead of a 182° line. This, of course, has the effect of widening the space between the departure range line and the Korhyu Wreck Buoy and, in effect, suggesting more room between the *Illinois* and the buoy than actually existed. In order to correct this error appellee has correctly depicted the 182° departure range on the chart which is attached hereto as Appendix A.

C. SPECIFIC FAULTS COMMITTED BY THE MV UNION STAR

1. The UNION STAR failed to maintain an adequate lookout.

In its Findings of Fact and in its Memorandum Opinion the District Court placed particular emphasis on the failure of each vessel to maintain an adequate lookout.[9]

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[8]Actually, there is general agreement that Pilot Hai was referring to the 164 ft. knoll or summit which is adjacent and to the west of Nui Ba Lai. (Tr 206:24-25.)

[9]Appellee has not filed a cross-appeal and so the fault of the *Illinois* in this regard is not at issue. Appellant nonetheless has devoted two pages (AOB 49, 50) of its brief to the argument that the *Illinois* was at fault for having an inadequate lookout. Since the district court found this as a fact and it is not challenged on appeal appellant is merely felling a straw man for the effect of it.

It is true that there were several men on the *Union Star's* forecastle head, but there is no indication that any one of them was stationed there as a lookout. In fact, it is undisputed that a few minutes before the collision the *Union Star* raised her anchor. This required the detail on the forecastle to operate the anchor windlass, retrieve the anchor, secure it and wash it down. In connection with the latter point, Seaman Dobas testified that when he saw the *Union Star* bearing down on the *Illinois* with her anchor still beneath the surface of the water he also saw water coming out of the hawse pipe, indicating the men on the *Union Star's* forecastle head were washing down the anchor chain as it was being retrieved. (Tr. 90:24-91:24.) The reason these men were on the *Union Star's* forecastle head cannot be disputed, and the record contains no testimony whatever that any of them acted as a lookout or reported anything to the bridge.

A lookout who does not report what he sees is the same as no lookout at all, and a crew member who is encumbered with other duties cannot be regarded as a lookout. As to the requirement that a lookout must report, Judge Learned Hand said in *The Madison,* 250 Fed. 850, 852 (2d Cir. 1918):

> "A lookout's duty is to report as soon as he sees, not only any vessel with which there is danger of collision, but any which may in any way affect the navigation of his own."

This was also held in *Diamond Navigation Co. v. Mystic SS Co.,* 5 F.2d 612 (9th Cir. 1925):

> "A lookout must use his ears, as well as his eyes, and must report what he hears as well as what he sees."

This requirement of vigilance leads to the concomitant requirement that a lookout have no other duties. As stated in *Griffin on Collision,* page 277:

> "The importance of unbroken vigilance on the part of the lookout is so great that, on vessels of any size, the rule is definite that the lookout must have no other duty . . . so a deckhand who has other duties, is not a proper lookout."

That this is the rule in the ninth circuit was held in *The Arkansan,* 112 F. 2d 223 (9th Cir. 1940), and *The Koyei Maru,* 96 F. 2d 652 (9th Cir. 1938). In *The Koyei Maru* both the chief officer and the boatswain were on the forecastle head with other crew members, but the court said:

> "The chief officer had other duties to perform besides those of lookout. They were 'standby' duties, which consisted in supervising anything necessary to make the vessel shipshape after her departure from her dock. . . . The boatswain near the first officer was engaged in an unexplained operation of 'doubling the screws of the anchor.' Even if the chief officer had attended to none of the 'standby' duties on leaving the harbor, they were a charge on his mind as the crew worked on the matters to be done around him which disqualifies him as a free and singleminded lookout."

The court went on to quote *The Ariadne,* 80 U.S. (13 Wall.) 475, 479 (1872), as follows:

> "The duty of the lookout is of the highest importance. . . . It is the duty of all courts charged with the administration of this branch of our jurisprudence, to give it fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and

> the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

It is quite true, but also irrelevant, that the navigating officers of the *Union Star* saw the *Illinois*. Visibility was good and it would be surprising if they had not seen her. But this does not establish that there was a proper lookout. Appellant has emphasized that there were four men on the bridge of the *Union Star* "who were concentrating on the channel downstream" (*sic:* upstream). (AOB 36.) There were the pilot, the master, the quartermaster and the third officer. What appellant does not say is that the third officer's function is to operate the engine room telegraph and record engine orders in the bell book, and the quartermaster's function is to concentrate on the compass in order to stay on course. The third man, Pilot Dy, admitted he was busy watching landmarks and aligning his vessel with reference to them. He said: "I took sightings as often as possible, so for instance I knew that I was passing around 1139 on the range from the green light on the jetty to the house of pilots . . .". (Tr. 220: 23-221:2.) The fourth man, Captain Hu, clearly had no accurate idea of the *Illinois'* heading or movement. For instance, he testified several times that he heard no whistle signals whatever from the *Illinois*. (Tr. 241:2-6; 264: 20-23.) It is true that he changed this testimony when reminded of a statement in which he claimed he heard the *Illinois'* two-blast whistle (Tr. 284:13-20), but in that same statement he also said that at 1136 when the *Union Star* weighed anchor and got under way the *Illinois* was

two points on his port bow more than a mile away, travelling at about ten knots. (Ex. 10, p. 2.) In fact, it is undisputed that at this time the Illinois was dead in the water about a half mile ahead of him. Captain Hu also said that at 1126, when he went up to the bridge with Pilot Dy, he observed the *Illinois* three miles away and two points off his port bow. (Tr. 262:13-17.) A glance at the chart shows this to be impossible, since it would put the *Illinois* in the middle of a shoal. Captain Hu also testified that when he gave the order to go full astern one minute before the collision the *Illinois* was one-half mile away, more than two points on the *Union Star's* port bow, and this was the first time he saw any change in the *Illinois'* rate of motion. (Tr. 268:24-269:23.) This of course is also impossible, since it would mean that the *Illinois* would have to proceed to the point of collision at an average speed of almost 30 knots, when in fact she was going 2½ to 3 knots at this point. (Tr. 131:7-15.) At another point Captain Hu testified that when he arrived on the bridge to give the order to weigh anchor he saw that the *Illinois'* pilot boat had already departed and was headed toward the beach (Tr. 262:22-24), whereas in fact the *Illinois'* pilot boat had not even arrived at the *Illinois'* side by that time. (Tr. 106:2-6; 109:16-21.) Later, when the *Union Star* had raised anchor and gotten under way, all he could say with regard to the pilot boat was "I didn't notice." (Tr. 262:22-263:7.) At still another point Captain Hu testified that when the *Union Star* got under way, the *Illinois,* while its bearing was not changing, appeared to be coming "nearer and nearer". (Tr. 238:18-20; Tr. 239:12-15.) Captain Hu went on to say that "then

they steer near where we stop." (Tr. 239:19.) The *Union Star's* bell book reflects that her engines were stopped at 1140. (Ex. M.) Since it is undisputed that the *Illinois* was dead in the water from the time the *Union Star* got under way at 1136 until she stopped her engines at 1140, it is obvious Captain Hu had a completely erroneous impression of what the *Illinois* was doing during that period of time. Captain Hu's testimony demonstrates that although he was aware of the *Illinois'* presence he was paying little attention to her. Both Captain Hu's and Pilot Dy's inaccurate and conflicting testimony concerning the heading and movements of the *Illinois* makes it evident that they were paying more attention to ranges, landmarks and perhaps activities on their own ship than they were to the *Illinois*. Whatever the cause of their preoccupation, it is certain that they did not carefully note the *Illinois'* initial movements, nor did they have any clear conception of her heading or rate of speed, and because of this they did not apprehend the danger of collision which the *Union Star's* navigation invited. In short, it cannot be said of this collision that it would have occurred regardless of whether a *Union Star* lookout had, at the appropriate time, reported:

> "The vessel ahead is getting under way and turning left."

Appellant has cited *The Catalina,* 95 F. 2d 283 (9th Cir. 1938), for the proposition that appellee had the burden of proving that the *Union Star* had no lookout. This is not true, for in *The Catalina* it was established as a fact that there was a specially assigned lookout who had no other duties. In *Osaka Shosen Kaisha, Ltd. v. Angelos,*

Leitch & Co., 301 F.2d 59 (4th Cir. 1962), cited by appellant (AOB 43), the court not only found that there were eight men on the bridge of the *Atlas Maru* and five men on the forecastle head, but affirmatively found as a fact that an attentive lookout was maintained and that all observable events were promptly noted and acted upon. Finally appellant cites a number of nineteenth century cases for the proposition that a vessel cannot be charged with fault for an improper lookout if that fault did not contribute to the collision. (AOB 44-46.) In fact, this is an inaccurate statement of the law. Failure to maintain a proper lookout is treated as a statutory fault. (*The Madison,* 250 Fed. 850, 852 (2d Cir. 1918).) A statutory fault can only be excused if it is affirmatively established "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." (*The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1874).) A similar concept was expressed somewhat earlier in *The Ariadne,* 80 U.S. (13 Wall.) 475, 479 (1872):

> "Every doubt as to the performance of the duty and the effect of nonperformance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

In *The Anna W.,* 201 Fed. 58 (2d Cir. 1912), the court noted that a vessel will be condemned "unless she can show affirmatively that, if there had been a lookout, and he had done his duty in seeing and reporting other vessels, and . . . [his vessel] had navigated in conformity with the information thus obtained, the collision would nevertheless have happened."

This burden is especially heavy where a vessel, such as the *Union Star,* chooses to navigate with engines full speed ahead in extremely close quarters with another vessel. In such circumstances a momentary lapse of attention can prove disastrous. After reviewing all of the testimony and the circumstances of the collision the district judge correctly found that the *Union Star* was not keeping a proper lookout and that this was the principal cause of collision.

2. The UNION STAR Did Not Sound the Required Whistle Signals.

In Captain Hu's testimony and in Pilot Dy's answer to interrogatories, as well as in appellant's opening brief, there is an obvious and noticeable hiatus in the description of the *Union Star's* maneuvers. The *Union Star* is described as proceeding first on course 348° for a period of three minutes, and then changing course to 353°. Later, at the time of collision, the *Union Star* was headed almost due east, or 090°, but there is no mention of what helm alterations were made to arrive at this collision heading. Obviously the *Union Star* had to turn right from her last course of 353° in order to alter her heading more than 90° so as to be headed due east at collision. Appellant is careful to avoid mentioning this course change, because it was made after the *Illinois* had signalled her own course change and was the occasion for the *Union Star's* only one-blast signal. Thus, her earlier course change from 348° to 353° was not signalled at all. This follows from the fact that it is admitted that the *Union Star* blew only one whistle signal to indicate a change of course to

starboard, and in its cross-libel appellant admitted that the *Union Star's* one-blast signal was given at the time of the *Union Star's last* starboard helm order. (Cross-libel, page 3, lines 14-17.) The fact that the *Union Star's* one-blast signal followed the *Illinois'* two-blast signal was also corroborated by the testimony of Second Mate McCarthy (Tr. 64:4-17) and Third Mate Stroup (Tr. 81: 3-82:6). The failure of the *Union Star* to signal its earlier course change from 348° to 353° is of considerable importance. In effect, it withheld from Captain Sorensen on the *Illinois,* then intending to get under way and turn left toward the departure range, the intelligence which such a signal would have conveyed: that the *Union Star,* then only a few hundred yards away, was initiating a turn in the same direction.

3. The UNION STAR Was at Fault in Directing Her Course Between the ILLINOIS and the Korhyu Wreck Buoy.

Perhaps the most obvious fault committed by the *Union Star* was in forcing a passage between the *Illinois* and the Korhyu Wreck Buoy.

It will be recalled that the *Illinois* was just 400 meters northwest of the Korhyu Wreck Buoy and that the *Union Star* claims to have intended to pass between the *Illinois* and the Korhyu Wreck Buoy on course 353°. On this heading the passage of the *Union Star* between the *Illinois* and the Korhyu Wreck Buoy would have to be accomplished in a path only 246 meters wide. Since Pilot Dy intended to pass 100 meters (Tr. 209:21-210:1) or 150 meters (Ex. E) away from the Korhyu Wreck Buoy it follows that he intended to pass within 96 to 146

meters (103 to 160 yards) of the *Illinois*. The hazards of such a passage can be visualized if it is remembered that the *Illinois* was 455 feet long and that the *Union Star* therefore intended to pass within about a ship length or less of the *Illinois*.

The recklessness of this maneuver can be fully appreciated if it is kept in mind (1) that there is a custom for inbound ships to wait for outbound ships to clear (Tr. 86:7-23) and (2) that Pilot Dy knew, or should have known, that the *Illinois* would proceed south on the 182° departure range line as soon as her pilot disembarked. The *Union Star's* fault was further compounded when, after hearing the *Illinois'* two-blast left-turn signal, she replied to that signal with one blast and turned in the same direction. A possible explanation for this reckless navigation is the assumption made by the *Union Star's* navigators that they were required to pass the *Illinois* port to port and should force such a passage if necessary. The *Union Star's* pilot kept ordering the helmsman to steer further and further to starboard, and Captain Hu evidently thought this was required by the Narrow Channel Rule for in his testimony he kept referring to the "starboard side of the channel". (Tr. 239:14-15; 240:1.) For instance, he said that "automatically we should keep on starboard side of channel (Tr. 239:14-15) . . . We expect *Illinois* should keep her starboard side of channel. . . ." (Tr. 239:24-240:1.) Then Captain Hu complained that the *Illinois* did "not change course, but . . . he just stay starboard side of channel because we already on starboard side." (Tr. 264:25-265:2.) In his earlier statement Captain Hu said that he didn't know

why the *Illinois* was coming left, since there was "lots of room on the other side." (Ex. 10.) In fact, the *Illinois* did not have "lots of room" because the departure range was quite close to the Korhyu Wreck Buoy. This fact was evidently not appreciated by Pilot Dy when he said that on course 353° "the *Union Star* would be at all times to the right of the 002° (reciprocal of 182°) range line on a line of more than a nautical mile. . . ." (Tr. 208:14-16.) This might indicate that he thought the departure range line was one mile to the west of his proposed course, when in fact it was only a few hundred feet.[10]

For whatever reason, it is apparent that the *Union Star* was determined to squeeze between the *Illinois* and the Korhyu Wreck Buoy heedless of the consequences which would result from any slight miscalculation on the part of either vessel. This was a clear-cut violation of both the Special Circumstances Rule[11] and the General Prudential Rule.[12]

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[10]Appellant attempts to gloss over this testimony by again suggesting that the translation is faulty. (AOB 9, footnote.) Appellee is not versed in the subtleties of the French language, but suggests that appellant should present Dy's testimony to this court in the same form as appellant presented it to the district court.

[11]33 U.S.C. 1089. *Special circumstances requiring departure from rules to avoid immediate danger (Rule 27):*

> "In obeying and construing sections 1078-1089 of this title due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from such sections necessary in order to avoid immediate danger."

[12]33 U.S.C. § 1091. *Usual additional precautions required generally (Rule 29):*

> "Nothing in sections 1061-1094 of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

4. The UNION STAR Carried a Misleading Signal.

Pilot Hai testified that the *Union Star's* anchor ball was still hoisted just before 1139, when he departed from the bridge and disembarked into the pilot boat. (Tr. 43: 15-20.) Captain Sorensen testified that when he observed the *Union Star* at 1140 just before altering course to the left her anchor ball was still hoisted. (Tr. 120:6.) Seaman Dobas testified that when he observed the *Union Star* bearing down on the *Illinois* just before collision her anchor ball was still hoisted and clearly visible on the *Union Star's* foredeck and at the same time he saw her anchor chain tending aft (indicating that the anchor was free of the bottom and the *Union Star* was under way at this time). (Tr. 91:2-18.) The evidence on this point is thus in clear conflict because both Captain Hu and Pilot Dy testified that the anchor ball was lowered before geting under way. The conflict is clear and appellee will observe only that while Captain Hu and Pilot Dy, as well as Captain Sorensen, may be suspected of self-serving testimony in justification of their own actions no such suspicion can attach to Pilot Hai, who left the vessel prior to collision, or to Seaman Dobas, who had nothing to gain by false testimony. Since there is no valid reason to disbelieve Seaman Dobas or Pilot Hai it is submitted that the *Union Star* should be held for the additional fault of carrying an improper and misleading signal, which led the navigators of the *Illinois* to believe that she was still at anchor when in fact she was under way.

D. THE DISTRICT COURT DID NOT ERR IN FAILING TO SPECIFICALLY RULE ON OTHER FAULTS ALLEGED.

The *Union Star* and the *Illinois* were navigating in special circumstances, having to pick up and disembark pilots and maneuver in accordance with local custom. In addition, the *Illinois* was required to depart from the area on a specific range line because of the absence of the normal sea buoy. All of these circumstances made it necessary for each vessel to navigate with the utmost vigilance and caution.

In his memorandum opinion the district judge made it clear that in his opinion the principal and overriding cause of the collision was the failure of either vessel to carefully and continuously watch the other so as to be immediately aware of any unexpected maneuvers.

There were a number of other faults charged by each vessel against the other, but each of these faults was predicated on testimony and evidence which was in a remarkable state of conflict. The *Illinois* charged the *Union Star* with five specific faults and the *Union Star* charged the *Illinois* with eight specific faults. Appellant has offered no authority for the proposition that it was incumbent upon the district court to rule upon all conflicts in the evidence, specifically deal with each charge of fault, and then, like an adding machine, add up the faults in appropriate columns and apportion the damages accordingly. The futility of doing so was commented upon by the English barrister Edward Stanley Roscoe in his text *The Measure of Damages in Actions of Maritime Collisions* (2d ed. 1920) at page 25:

> "There is also the further point to be noted, that the datum on which the proportion of damages is based is too uncertain to result in substantial justice. For the relation of negligence in navigation to proportion of damages is so uncertain that the award of proportional damages is just as rough justice as the award of half and half damages."

Faced with sharply conflicting evidence which was alleged to support a wide variety of faults on the part of both vessels, but feeling that the principal and overriding cause of collision was inattentiveness, the district court felt justified in giving only passing reference to the charges of fault which it found to be comparatively minor. The court in finding of fact No. 8 found:

> "The court finds that the faults of each vessel in failing to have the proper lookout, and in all other respects, were equal in degree and contributed in equal degree to the ensuing collision."

The district judge was required to do no more.

V. THE QUESTION OF LACHES WAS PROPERLY DECIDED BY THE DISTRICT COURT

Appellant unsuccessfully sought to raise the bar of laches in the trial court and now attempts an encore in this court. The same arguments presented below are advanced by appellant here: That it was prejudiced because the libel was not sooner filed and that appellee had "no legal excuse" for not commencing its action at an earlier time. (AOB 58, 59.) By way of introduction to these con-

tentions appellant in its brief (AOB 55-58) purports to summarize the doctrine of laches. This summary is correct, but incomplete because it ignores the basic principle that "the existence of laches is a question primarily addressed to the discretion of the trial court. . . ." (*Gardner v. Panama R.R.*, 342 U.S. 29, 31, 1951 A.M.C. 2048, 2049 (1951).) Discretionary action is final "and cannot be set aside on appeal except when there is an abuse of discretion. . . ." (*Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942).) Such abuse occurs "only where no reasonable man would take the view adopted by the trial court." (Id.) The reasonableness of the trial court's action becomes apparent when appellant's arguments are examined in detail.

A. APPELLANT WAS NOT PREJUDICED BY THE LAPSE OF TIME BETWEEN THE COLLISION AND THE FILING OF THE LIBEL.

In the first argument in support of its claim of prejudice appellant requests this court to take judicial notice of events in Vietnam, contending that its investigation of the collision "was severely affected by the war. . . ." (AOB 58.) No reference to the record is made in support of this contention. We are not told in what way the effect of the war in Vietnam was felt by a Chinese steamship company, a Chinese vessel and its Chinese crew. Judicial notice of the war may be proper, but the rhetoric of appellant's brief is the only connection between that war and appellant's ability to prepare its case.

Appellant also notes that certain witnesses were not available at the time of trial. (AOB 59.) The effect of

their absence appellant does not state. Candor requires appellee to concede that its case would have been stronger if the helmsman and watch officer of the *Illinois* had been available to testify. Appellee also regrets that its witness on the issue of damages was killed in an automobile accident shortly before the trial. (Tr. 192:7-9.) A reading of the record, however, hardly supports the inference that these gentlemen, had they appeared, would have been the linchpins upon which the success of either side's case was dependent.

Appellant further argues that certain of its witnesses whose testimony was presented by deposition were "'hazy, vague and unclear' on several important points in issue." (AOB 59.) No citation to the record is made in support of this argument. The chief witnesses for appellant were Phan-Van-Dy, pilot of the *Union Star,* and Captain S. D. Hu, the vessel's master. A reading of their testimony (Tr. 198-224; 225-254; 259-286) clearly indicates that their recollection of the collision was not significantly impaired at the time of their depositions.

In its final contention on the issue of prejudice appellant asserts that "because of the passage of time" the master of the *Union Star* testified at his New York deposition "without having the vessel's deck log book available to him. . . ." (AOB 59.) The inference which appellant desires to be drawn is that the log became unavailable because of the passage of time between the collision and the filing of the libel. The record, however, reveals the invalidity of such an inference. Toward the end of trial appellant offered into evidence what its counsel described as "a copy of our rough log book dated August 26, 1960,

which covers the full period in which the collision occurred. . . ." (Tr. 290:25-291:2.) When asked by appellee's counsel when the copy was made appellant's counsel replied, "1961, January of '61." (Tr. 291:12.) Counsel did not offer any explanation in the trial court why the copies thus obtained and later introduced at trial were not provided to the master at his deposition. Whatever the reason, the record demonstrates that the absence of the log was not related to the time appellee chose to file its libel.

Against appellant's allegation of prejudice stands the record of the trial. This record establishes that the testimony of the most significant witnesses to the collision was presented to the trial court and that all relevant records required by either side were available at the trial. The trial judge, to whose discretion decision of the issue was committed, found no prejudice to appellant. The record supports that finding and appellee respectfully submits that no basis exists for its overturning by this court.

B. THE DELAY IN FILING THE LIBEL WAS EXCUSABLE.

Appellant asserts that "the record contains absolutely no evidence resembling an excuse by appellee for its admitted delay in filing the libel." (AOB 60.) This assertion ignores the evidence adduced at trial which revealed a pattern of early investigation, unsuccessful settlement efforts and, finally, litigation. In holding that whatever delay which occurred was reasonable and excusable (im-

plicit in its finding against laches) the trial court considered the following facts:[13]

1. The collision occurred on August 26, 1960, in the mouth of the Saigon River. (Appellant has at no time contended that it was not aware of the occurrence of the collision at or very soon after the time of its occurrence.)

2. On July 7 and July 18, 1961, counsel for appellee and appellant exchanged letters of guarantee issued on behalf of the underwriters concerned in order to avoid seizure of the vessels involved in the collision. (Tr. 330: 16-20.)

3. On December 20, 1961, counsel for appellee wrote to counsel for appellant, stating as follows:

> "When we obtained the letter of guarantee in lieu of seizing the ship, it was our understanding that you were going to review your file particularly as it relates to the damage statement of the *Union Star,* and we were then going to sit down and see if we could come to any agreement on the case without the necessity of filing suit and going through the time-wasting process of a lot of pleadings.
>
> "Our client has inquired several times as to progress, and we have had to report no progress.
>
> "Will you please consider this at your early convenience and contact us?" (Tr. 330:24-331:11.)

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[13]Appellant "disputes that appellee properly introduced a single item of evidence relevant or admissible to refute the defense of laches." (AOB 61.) Typically, no elaboration of this assertion is made, and two sentences later appellant concedes arguendo that admissible evidence was presented. Having conceded its admissibility, appellant then contends that the evidence was irrelevant. (AOB 61.) The illogic of this argument is apparent.

4. On May 11, 1962, appellant's counsel forwarded to appellee's counsel statements of vessel personnel and copies of vessel documents, log book entries and bell book entries. The letter accompanying these documents concluded:

> "The writer will be out of town until the week of the 28th, but will arrange to discuss this matter further with you as soon as practicable after his return." (Tr. 332:11-14.)

5. On June 26, 1962, appellant's counsel wrote to appellee's counsel requesting the particulars of the damage to the *Illinois*. (Tr. 332:15-18.)

6. On September 14, 1962, over two years after the collision, appellant instituted suit against appellee in Formosa. This suit was later dismissed for lack of jurisdiction. (Tr. 332:19-21.)

7. On October 10, 1962, appellant's counsel wrote to appellee's counsel contending that China Union Lines, Ltd. was not liable for certain portions of the damages claimed in behalf of the *Illinois*. (Tr. 332:22-333:2.)

8. On June 14, 1963, appellee filed its libel in this action.

9. On September 23, 1963, appellant filed its answer and accompanied it with a cross-libel alleging that the *Illinois* was solely at fault in the collision between it and the *Union Star*.

Thus, the record reveals that appellant knew of the collision, that it was aware of the possibility of litigation, that it participated in a continuing exchange of informa-

tion with appellee, and that both sides were actively engaged in efforts to resolve the dispute short of litigation. Moreover, just nine months before appellee commenced its action appellant was sufficiently confident of its position to initiate suit against appellee.

Appellant relies heavily upon the decision in *Ronda Cia. Maritima, S.A. v. MV Dagali,* 239 F. Supp. 447, 1964 A.M.C. 2118 (S.D.N.Y. 1964). The court there held that an agreement to appear was not alone sufficient to excuse delay. There is no indication that anything further transpired between the parties, as is the case in the present action. As this court observed in *Brown v. Kayler,* 273 F.2d 588 (9th Cir. 1959):

> "Each case [involving laches] must be determined according to its own particular circumstances, and it is rare to find the circumstances in one case to be exactly the same as the particular circumstances of another case." (273 F.2d at 592.)

In the present case appellant's own counsel gave perhaps the best indication why litigation was finally resorted to by appellee. Toward the end of trial the following colloquy occurred between the court and appellant's counsel:

> "The Court: I suppose you have covered all the area of possible adjustment?
>
> . . . .
>
> "Mr. Phillips: There has been a discussion over a period of years in this and I believe more than likely one of the difficulties is the larger amount of damages that the *Illinois* has sustained and therefore creates difficulties from a settlement posture." (Tr. 254:22-255:4.)

Appellant respectfully submits that delay in filing suit is reasonable and excusable where the record reveals, as it does here, a continuum of activity on each side during the period between the incident giving rise to the dispute and the institution of legal action to effect its resolution.

VI. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OFFERED BY APPELLANT CONCERNING REPAIR COSTS IN JAPAN

At trial appellant sought to introduce testimony concerning repair costs in Japan. (Tr. 306:8.) The trial court excluded this evidence on the basis of irrelevancy, and appellant assigns this exclusion as error. (AOB 62-66.)

In support of its contention appellant relies upon *Restatement, Torts,* section 918, which provides that a person injured by the tort of another is not entitled to recover damages for harm "he could have avoided by the use of due care after the commission of the tort." Appellee has no quarrel with this fundamental principle, which also finds expression in the various decisions cited by appellant. (AOB 64-65.) The doctrine of mitigation as stated by appellant is not applicable here because the trial court held that the provisions of appellee's Government subsidy contract (discussed *infra*) required appellee to have the *Illinois* repaired in a United States shipyard. Appellee was therefore in no position to "avoid" any possible higher repair cost which may have resulted. Given this circumstance the testimony of Mr. Martignoni offered on the subject of repair costs in Japan was obviously irrelevant and was quite properly excluded by the trial court.

VII. REPAIRS TO APPELLEE'S VESSEL WERE PROPERLY ACCOMPLISHED IN THE UNITED STATES IN ACCORDANCE WITH ITS GOVERNMENT SUBSIDY CONTRACT

A. APPELLEE'S SUBSIDY CONTRACT WITH THE GOVERNMENT REQUIRED REPAIRS TO BE ACCOMPLISHED IN THE UNITED STATES.

Appellant concedes (AOB 68) that at all relevant times appellee's vessel, the *Illinois,* was operated under a Government subsidy contract made pursuant to the Merchant Marine Act, 1936. (46 U.S.C.A. §§ 1101-1294.) That act provides in part:

> "[T]he operator shall perform repairs to [its] subsidized vessels within the continental limits of the United States, except in an emergency." (46 U.S.C.A. §1176(7).)

Section II-4 of appellee's contract with the Government contains a similar provision:

> "[T]he Operator shall perform repairs to any such [subsidized] vessel within the continental limits of the United States, except in an emergency." (Exh. R, 160:102.)

Appellant attempts to avoid the plain meaning of the act and appellee's contract by characterizing the damages suffered by the *Illinois* as an "emergency" which would have permitted repairs to have been accomplished outside of the United States. The word "emergency", the meaning of which connotes a pressing need calling for immediate action, is clearly inapposite to the status of the *Illinois* following the collision. As appellant's counsel noted in his opening statement in the trial court, "each vessel . . . accomplished temporary repairs and . . . about eight hours later . . . she [the *Illinois*] got under way and

went on to her next port." (Tr. 7:12-15.) A ship which is able to proceed on her voyage following a collision is clearly not involved in an emergency, and appellee most certainly would have breached its subsidy contract had it directed the Illinois to a foreign shipyard for repairs.

B. THE LEGISLATIVE HISTORY OF SECTION 1176(7) OF TITLE 46, UNITED STATES CODE, SUPPORTS APPELLEE'S CONTENTION THAT IT WAS REQUIRED TO REPAIR ITS VESSEL IN THE UNITED STATES.

Appellant quotes (AOB 70-71) a remark made on June 19, 1936, by Senator Copeland in the course of debate over the proposed Merchant Marine Act. In this regard appellant's ploy of quoting out of context may be overlooked because even when the senator's remark is read in context it is not clear to what portion of the act he had reference. Portions of the Congressional Record ignored by appellant do make clear, however, that Senator Copeland was not referring to the present section 1176(7). On June 18, 1936, Senator Bone posed a question to Senator Copeland concerning the repair of American vessels in foreign yards. He said:

> "Mr. President, I should like to ask the Senator in charge [Copeland] of the pending bill whether any provision is to be made to reach a situation of this kind[:]
>
> "The Senators from Washington have telegraphic protests from the Pacific coast against the action of a certain steamship company or companies out there which have been docking and repairing these heavily 'sugared' boats in Chinese dry docks with Chinese labor. . . . I think there should be language in the bill which will make it impossible for the American

> taxpayers to be compelled to provide the money for heavily subsidizing these boats which are repaired in Chinese docks and shipping yards."

Senator Copeland replied:

> "Mr. President, I will say to the Senator from Washington that the Senator from Pennsylvania . . . has just offered an amendment to cover the very matter the Senator has in mind." (80 Cong. Rec. 9919 (1936).)

The amendment referred to is now section 1176(7) of Title 46. When it was presented to the Senate on June 19, 1936, Senator Borah asked Senator Copeland concerning its effect. He gave the following explanation:

> "As I understand, the intention is to require the use of materials the product or manufacture of the United States in repairing vessels, and that *so far as possible* repairs shall be made in continental American shipyards."
>
> "Mr. Guffey [of Pennsylvania]: The Senator has correctly stated the purpose of the amendment."
>
> "Mr. Copeland: So far as I am concerned, I join my distinguished colleague on the committee in favoring the amendment." (80 Cong. Rec. 10077-10078 (1936).) (Emphasis added.)

Appellant's interpretation of the legislative history is thus misleading and demonstrably incorrect.

C. APPELLANT IS LIABLE FOR THE COST OF REPAIRS ACCOMPLISHED IN THE UNITED STATES PURSUANT TO ITS GOVERNMENT SUBSIDY CONTRACT.[14]

In further reiteration (AOB 71) of its unsupported contention that the cost of repairs made in the United States was an improper measure of damages, appellant relies on the decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 72 L.ed. 290 (1927), where Justice Holmes held that a time charterer could not recover from a dry dock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during the semi-annual drydocking required by the charter party. It is apparent that appellee's position is not analogous to that of the time charterer in *Robins* as appellant suggests, but rather to that of the vessel owner. It is undeniably the law that a recoverable item of collision damage is the loss of hire suffered by a vessel in collision whose charter is interrupted. (*United States v. Panama Transp. Co.,* 174 F. Supp. 592, 1959 A.M.C. 1435 (S.D.N.Y. 1959).) In passing it may be noted that the broad statement by Justice Holmes quoted in appellant's brief (AOB 71) has previously troubled this court (*Borcich v. Ancich,* 191 F.2d 392 (9th Cir. 1951) (following *Robins*); *Carbone v. Urcich,* 209 F.2d 178 (9th Cir. 1953) (on similar facts overruling *Borcich* and distinguishing

[14]In the district court appellant argued that any amounts received by appellee from the Government in direct or indirect reimbursement of the cost of repairing the *Illinois* should be deducted from the total repair bill. The decision of this court in *Gypsum Carrier, Inc. v. Handelsman,* 307 F.2d 525 (9th Cir. 1962), concerning the collateral source doctrine has apparently persuaded appellant to abandon the contention on appeal. The argument now advanced takes a different tack, but follows an equally misdirected course.

Robins), and *Robins* clearly deserves no consideration where it is not in point.

Appellant also relies upon *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854), and then is forced to concede its inapplicability to the present case because there is "no contractual relationship between the parties here. . . ." (AOB 72.) Finally, appellant cites *Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597, 10 L.ed. 2d 1 (1963), for the proposition that "the full scope of the admiralty rule of damages must prevail over contrary provision and the absence of a contractual relationship between the parties is not conclusive." (AOB 72.) In *Weyerhaeuser,* the Supreme Court held that a private vessel owner was entitled to recover as part of collision damages from the United States sums paid in settlement of a personal injury claim made by a Civil Service worker employed on the Government vessel involved, notwithstanding the fact that the employee had received compensation under the Federal Employee's Compensation Act, stating that "the full scope of the divided damages rule must prevail over a statutory provision which, like the one involved in the present case, limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision." (372 U.S. at 603, 10 L.ed. 2d at 6.) The point decided in *Weyerhaeuser* has no application here, even as distorted by appellant.

D. THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND CHINA IS INAPPLICABLE TO THE QUESTION OF APPELLEE'S DAMAGES.

Although the gossamer threat of appellant's argument (AOB 72-73) is difficult to follow it appears to rest on the premise that an award of damages based on the cost of repairs in a United States shipyard would accord American vessels more favorable treatment than Chinese vessels, in violation of the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946. ([November 30, 1948] T.I.A.S. No. 1871.)

In Restatement (Second), Foreign Relations Law of the United States, Section 146 (1965), the following guideline is established for the interpretation of a treaty:

> "The extent to which an international agreement creates, changes, or defines relationships under international law is determined in case of doubt by the interpretation of the agreement. The primary object of interpretation is to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made. This meaning is determined in the light of all relevant factors."

The speciousness of appellant's syllogistic argument becomes apparent from even a casual examination of the treaty in question. Such examination reveals that the purpose of the treaty was far more humble than, as appellant suggests, to abrogate significant portions of the laws governing the United States maritime industry.

Appellant relies on paragraph 1 of article XXII of the treaty, which provides in relevant part:

> "The vessels and cargoes of either High Contracting Party shall, within the ports . . . of the other High Contracting Party, in all respects be accorded treatment no less favorable than the treatment accorded to the vessels and cargoes of such other High Contracting Party. . . ."

Appellant ignores the remaining paragraphs of article XXII, which shed considerable light on the meaning which should be attached to paragraph 1. Paragraph 2 proscribes the levy on Chinese vessels of duties of tonnage, harbor pilotage, lighthouse and quarantine which do not equally apply to American vessels. In paragraph 3 charges on passengers, passenger fares, freight money and the like are not to be applied so as to give one country an advantage over the other. The next paragraph provides that competent pilots are to be made available, and paragraph 5 gives assurance that if a Chinese vessel in distress puts into an American port, "it shall receive friendly treatment and assistance. . . ." The sixth and final paragraph promises to accord Chinese vessels treatment no less favorable than that accorded vessels of any third country. Considered in context, the provisions of article XXII are obviously directed to the establishment of equality in the ordinary course of commerce between the two parties, and paragraph 1 thereof cannot reasonably bear the strained meaning which appellant asks this court to apply.

VIII. THE COST OF DRY-DOCKING THE ILLINOIS WAS PROPERLY INCLUDED IN THE DAMAGES AWARDED APPELLEE BY THE TRIAL COURT

Appellant contends (AOB 66-67, 73-75) that appellee failed to establish the reasonableness of its repair cost

in regard to the item concerning the dry-docking of the *Illinois*. In support of this contention appellant relies upon the testimony of its expert witness, John Walsh. Mr. Walsh was of the opinion that dry-docking was unnecessary because replacement of the plate involved could have been accomplished by appropriate ballasting and placing of weights on the *Illinois*. (Tr. 311:16-312:13.)[15] He admitted that his opinion was based solely on the survey report made Mr. Frank George of Pillsbury & Martignoni, who Mr. Walsh agreed was one of the best marine surveyors in the city of San Francisco. (Tr. 313:20-22.) This report (Ex. O) was received into evidence at the request of appellant's counsel. (Tr. 312:14-16.) Examination of this report reveals that the decision to dry-dock the *Illinois* was made only after careful consideration. Mr. George's preliminary conclusion was that dry-docking would not be required. (Ex. O, p. 7.) When the vessel arrived at the shipyard a supplementary survey was held by Mr. George in company with four other surveyors. (Ex. O, p. 8.) Upon reexamination of the damaged areas Mr. George concluded that "since the lower seam of plate H-6-S was only approximately 4" above floating waterline of vessel . . . it would be necessary to dry dock vessel at this time to renew plate H-6-S." (Ex. O, p. 8.) Mr. Walsh conceded that he had no knowledge of the conditions pertaining at the time the *Illinois* was dry-docked, that dry-docking would in any event add a margin of safety, and

[15]Appellant states that Mr. Walsh "concluded that dry docking might easily have been necessary by reason of repairs or maintenance unrelated to collision damages." (AOB 74.) This statement is unsupported by citation to the record, most probably because the conclusion was never uttered by Mr. Walsh but only by appellant's counsel during argument on an objection. (See Tr. 314:7-11.)

that his view simply reflected a dispute between experts. (Tr. 315:24-316:21.) The district court elected to follow the judgment of Mr. George rather than Mr. Walsh. Appellee respectfully submits that no basis exists for holding this election to be clearly erroneous, and the award of damages covering the cost of dry-docking the *Illinois* should therefore be upheld.

CONCLUSION

Although the amount at issue is comparatively small for a maritime collision, the issues, both factual and legal, are quite complex. The district judge was faced with contradictory testimony and a record with conflicts almost impossible to resolve.

The district court gave careful, meticulous attention to the numerous contentions of the parties, to the testimony and to all of the evidence. The record, we submit, leaves a firm and definite conviction that justice has been done, rather than a conviction that a mistake has been committed. The judgment of the district court should be affirmed.

Dated, San Francisco, California,
December 5, 1966.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellee
States Steamship Company.

(Appendix A Follows)

Appendix


BAIE DE
GANH RAI
Departure Range
Can Gio
Lower
Gp Fl(2)4sec 56ft 7M
Nui Vung Tau Lt
142°
(322°)
Pte. Ganh Rai
(Pte du Lazaret)
Fl WR 6sec 62ft 6M
Banc
du Phare
OBSC
Gp Fl R (2)
FR 426ft 12M
Existing
Pte Vung
Mean
Fauxes Bank
(Fairway)
Mui De Cao Trang
(Gd Eperon)
Fl 2sec 66ft 7M
Baie des Cocotiers
(Cocoanut B)
(Pilots)
ILLINOIS stopped
headed 145°
Fl G
Fl G 3M
Wreck
7Occ
Missing
Fl 8sec 5M
UNION STAR at
10° 20' N, 107° 31' E
Headed NNW (337½°)
Be Range
Ben Do
Nui Vung May
797
490
Ben Dinh
Thang Nhi (high)
CHY
Barracks
Nui Hoa Bap
320
Cu Lao
Tau
Cu Lao
Ben Dinh
Song Dinh
TR
7 Wks
Cha Va
Bai Luoi
Song Dinh
Gp Gang
25'
Cap
St Jacques
Sand bank
APPENDIX A
Nui Vung Tau
Fl(2)12sec 633ft 20M
(Sig Sta)
(Storm Sigs)
907
LH (old)
Ile Archinard
41(32)
20'